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In The

# Supreme Court of the United States

October Term, 1997

HEATHER ANN SEWELL,

*Petitioner,*

*vs.*

TOWN OF LAKE HAMILTON,

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*

## RESPONDENT'S BRIEF IN OPPOSITION

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## STATEMENT OF THE CASE

### A. Procedure: Petitioner, Alleging A Criminal Attack On Her By A Town of Lake Hamilton Police Officer, Sued Only The Town And Only For A Violation Of 42 U.S.C. § 1983.

As this Court most recently observed in *Board of the County Commissioners of Bryan County, Oklahoma v. Brown*, __ U.S. __, 137 L. Ed. 2d 626, 117 S. Ct. 1382, 1390 (1997),

> [A] plaintiff seeking to establish municipal liability on the theory that a facially lawful municipal action has led an employee to violate a plaintiff's rights must demonstrate that the municipal action was taken with deliberate indifference as to its known or obvious consequences. A showing of simple or even heightened negligence will not suffice.

Respondent agrees with the Petitioner's statement of the case in so far as the procedural history of this case is outlined. The Respondent would, however, pause only to emphasize that the Petitioner (Plaintiff below) *chose* to sue *only* the Town of Lake Hamilton and *only* under a theory of 42 U.S.C. § 1983 liability for the criminal assault on her by Officer Paul Stines. There were no claims alleged against the perpetrator of the sexual assault, nor did the Petitioner allege a state law negligence claim against the Town for the acts of its officer. Unlike § 1983 actions, damages for a state law negligence claim against the City would have been limited pursuant to state statute. *See* § 768.28, Fla. Stat. And, also unlike § 1983 actions, there are no attorneys' fees awarded to a successful plaintiff under a state law negligence claim. The Respondent draws the Court's attention to the legal backdrop for Petitioner's decision on how to prosecute her claim because, ultimately, the Respondent's argument throughout has been that the nature of Petitioner's

claim is not one suited to the particular requirements of § 1983 municipal liability.

**B. Facts: Petitioner Overemphasizes Legally Insufficient But Dramatic Facts In Hopes Of Distracting The Court From the Legal Inquiry Relevant To The Remedy She Chose To Pursue.**

The Petitioner states that the Respondent had absolutely no written training program or policies and procedures regarding officers' interaction with female suspects. She then implies that the absence of a formal policy on these matters causally led to the unprecedented criminal actions of Officer Paul Stines. She recounts in detail the event of the sexual assault by Stines and attacks the Town for failing to prevent it.

Below, the Respondent takes issue with the Petitioner on several points in the factual summary of the case regarding the Respondent's policies, customs, and procedures. But it is critical as the Court reviews the differing versions of the facts adduced at trial that the Court keep in mind that, even if the Petitioner's version were completely accurate, it cannot be held that this single unprecedented criminal act of Stines was *caused* by the Town. Additionally, even under the Petitioner's version of the facts, it is still not legally possible to conclude that a town is deliberately indifferent to the rights of its citizens simply because it fails to train its officers not to commit blatant criminal acts.

As of May 13, 1991, the date of the incident which is the subject of this lawsuit, officer Paul Stines was one of just five police officers employed by Lake Hamilton, Florida. The Town was only 1 mile by 1 mile in size, with a population of approximately 1,000. Until the May 13, 1991 incident forming the basis of this lawsuit, the Lake Hamilton Police Department had *never* received a complaint regarding *any* form of sexual

harassment by *any* of its officers or employees. (R4-109-18, 24).

Officer Stines graduated number one in his police academy class and, until May 13, 1991, there had been *no* complaint from the public regarding Officer Stines' conduct as a police officer. There was no information from any source that would have led the Town or the Lake Hamilton Police Department to anticipate misconduct on the part of Stines. Stines' co-workers testified that they observed him in the field, including interaction with female suspects, and that they saw nothing that would lead them to believe that Stines would commit the acts alleged here. (R1-32-130; R4-108-77; R4-109-4; R4-108-194; R4-108-72, 77).

Contrary to Petitioner's implication that officers working for the Town received no training whatsoever, officers employed by the Town, including Stines, received training at the police academy involving more than 600 hours of work. The training also included hands-on instruction in police work, with specific training in how to conduct a traffic stop, make an arrest, and the search of vehicles. (R4-108-44, 45, 123; R4-108-44, 45, 80, 81, 107).

Most importantly, and in accord with the simplest of common sense, the officers knew, without any specific written guidance, that it was improper to request sexual contact in exchange for ignoring criminal activity. The officers were specifically instructed at the Police Academy that it is improper to make a sexual advance to a suspect during a traffic stop. (R4-108-84; R4-108-123).

Contrary to Petitioner's suggestion that officers were hired, given a badge and a gun, and let loose, officers employed by the Town received field officer training. This training included familiarizing the officer with the Town, paperwork practices and

procedures, and accompaniment by a veteran officer for at least two weeks. Specific practices and policies for on-duty officers included reporting time and mileage to the dispatcher when picking up and transporting a female suspect. Police communications were monitored on a 24-hour basis by a scanner located in the police chief's home. The Town used dispatchers stationed in the neighboring Haines City Police Department and those dispatchers were regulated by Haines City police officials. These dispatchers made regular radio safety checks, usually hourly, of Lake Hamilton on-duty officers. (R4-108-105; R4-108-152; R4-108-179, 180; R4-108-118, 122, 161, 162; R4-106-153).

Petitioner points to the testimony of Respondent's expert regarding absence of certain written police procedures and claims that the expert testified that the Town should have had written guidelines. Petition at 7. Petitioner's rendition of this expert's testimony is based on an out of context statement that Petitioner distorts into a claim of civil rights liability. What the expert *actually* concluded was that the Town was "remiss" for not having a written procedure *but* that the Town's reliance on police academy training was reasonable, that the small size of the Town rendered the way in which the Town supervised its officers reasonable, that the officers had a perfectly valid personnel manual, and that the oral policies and procedures among the handful of officers employed there was consistent and reasonable as regards the stop and search and frisk of female traffic suspects. (R5-109-146-150).

Petitioner's framing of the case with out-of-context statements is symptomatic of her approach to the appeal and illustrates her misperception of the nature of a civil rights suit against a municipality. She claims that officers received no training whatsoever in how to deal with female arrestees, then blames her assault on the lack of training. Aside from the fact

that the officers did receive such training (as described in the preceding paragraphs), no reasonable person could come to the conclusion that a lack of training in handling female traffic suspects *caused* Officer Stines to criminally attack the Petitioner.

Petitioner claims that the Town did not have a policy on sexual harassment and that this lack of policy *caused* Stines to attack her. But given that the officers undeniably knew that they should not extort sex from female traffic suspects, it is certain that lack of a policy on sexual harassment did not cause Stines to attack the Petitioner. And, because the act was so extreme — indeed blatantly criminal — how can one legally conclude that a town is "deliberately indifferent" to the rights of female arrestees for not training its officers against something so clearly wrong?

In a distortion of the legal significance of the record in this case, Petitioner recites for the Court the testimony of Town Police Chief Freeman. Petition at 9. The Petitioner concludes that, because the Chief knew before the incident that it was *possible* that an officer could abuse his position when alone on shift, leaving him alone *caused* Stines to commit his assault on Petitioner.[1] As will be seen below, § 1983 municipality causation requires much, much more than a simple general knowledge of a risk that an officer can do something — anything — wrong when he is unsupervised. Where an officer has no history of misconduct, and there has been no complaint of a widespread problem (or even an isolated one for that matter), proof of

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1. Petitioner suggests at one point that the Town police chief "knew he had a volatile situation" by virtue of the fact that, in this tiny one square mile town of 1,000 people he relied on his officers' judgment not to attack people. Petitioner's characterization of the situation as "volatile," where there had never before been any complaint against any officer for anything remotely resembling this case, is melodramatic in the extreme.

opportunity does not equate with proof of causation. As this Court noted in *Brown*:

> Every injury suffered at the hands of a municipal employee can be traced to a hiring decision in a "but-for" sense: But for the municipality's decision to hire the employee, the plaintiff would not have suffered the injury. To prevent municipal liability for a hiring decision from collapsing into respondeat superior liability, a court must carefully test the link between the policymaker's inadequate decision and the particular injury alleged.

*Brown*, 117 S. Ct. at 1391.

Similarly, the mere creation of opportunity for an officer to engage in unprecedented and egregious criminal activity does not invariably lead to civil rights liability for the municipality. As seen below, the Town of Lake Hamilton, with no warning whatsoever of Stines' criminal attack on Petitioner, is certainly far less at constitutional fault than the County exonerated by this Court in *Brown*.

## REASONS FOR DENYING THE WRIT

### I.

### THIS CASE DID NOT MEET THE CLEAR MUNICIPAL LIABILITY REQUIREMENTS OF *MONELL*.

Petitioner observes that in *Brown*, two justices of this Court, joined by two others, wrote to express their frustration with application of the municipal liability theories of *Monell v. New York Dept. of Social Servs.*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978) to the facts in *Brown*. Specifically, Petitioner

notes that the dissenting justices suggested that a reexamination of the respondeat superior, causation and municipal culpability issues growing out of *Monell* be reconsidered. Petitioner contends that the instant case is a "compelling example of the complexity and confusion in the area of §1983 law" and that this case provides the Court with an opportunity to revisit *Monell*. Petition at 12. For the reasons that follow, Petitioner is incorrect.

It bears mentioning at the outset that the parties are actually in agreement as to the high hurdles placed upon civil rights plaintiffs who *choose* to sue municipalities. As the Petitioner observes, this Court and the various circuit courts of appeal demand both that a municipality's custom or policy *cause* the constitutional deprivation, and that the policy or custom be adopted with deliberate indifference to the rights of the plaintiff or the public. In this regard, the Petitioner's call to reexamine *Monell* is easily dispatched. If the Court does not wish to disrupt two decades of civil rights law, choosing instead to leave *Monell* undisturbed, then this Petitioner cannot recover against this municipality on these facts. Again, Petitioner elected to institute suit against the Town of Lake Hamilton and only for a violation of § 1983.

This Court in *Brown* discussed in general terms the scenario wherein a plaintiff can prove a failure to train municipal civil rights case in the absence of prior incidents. *Brown*, 117 S. Ct. at 1391. This Court summarized the relevant holdings of *Monell* and *City of Canton v. Harris*, 489 U.S. 378, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989), in this way:

> [I]n a narrow range of circumstances, a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring

> situations. The *likelihood* that the situation will recur and the *predictability* that an officer lacking specific tools to handle that situation will violate citizens' rights could justify a finding that the municipal policymakers' decision not to train the officer reflected "deliberate indifference" to the obvious consequences of the policymakers' choice . . . . The *high degree of predictability* may also support an inference of causation — that the municipality's indifference led directly to the very consequence that was so predictable.

*Brown*, 117 S. Ct. at 1391 (emphasis added).

Petitioner's allegations that the facts of this case meet that test are unfounded. As the Eleventh Circuit recognized in its decision in this case, there are some courses of action which are so obviously wrong that they cannot be linked as a matter of law to an official policy or custom. *See* Appendix 5 to Petition; slip op. at 5. That is, because Stines' conduct was so unpredictable, unprecedented, and so blatantly wrong, the Town was neither at fault for having been deliberately indifferent to such a bizarre risk nor the cause of Stines' criminal behavior.

Petitioner contends that creating the possibility of a constitutional violation equates with causing it because "history and human nature" suggest that it is inevitable that male officers will succumb to "a powerful incentive" to manipulate or attack female suspects. Petition at 25. Aside from Petitioner's repugnant suggestion that the Town should have assumed that its employees were likely to sexually attack its citizens, Petitioner commits the common fallacy of mixing opportunity with causation. *Brown*, 117 S. Ct. at 1391.

The very reason that the mere creation of some general risk

is insufficient to lead to municipal liability is because, ultimately, mere creation of an undefined risk leads to respondeat superior. *Id.* at 1388, 1391.

The defect in Petitioner's reasoning is that she assumes, as did the plaintiff in *Brown*, that she merely needs to show an inadequate policy and a bad result to prevail. That is not the law. Regardless of how much criticism is levelled at the Town of Lake Hamilton for absence of a formal written sexual harassment policy, or for allowing male officers to work alone, and regardless of Petitioner's traumatic experience, the ultimate question remains: Did the Town's lack of policy or supervision, adopted with deliberate indifference, cause Petitioner's injuries? Because of the nature of Stines' actions, the Eleventh Circuit Court of Appeals held that it could not. That decision is in accord, not just with the evidence in the case, but with the well-reasoned municipal liability principles of *Monell* and *City of Canton*.

## II.

## THERE IS NO CONFLICT WITH *VINEYARD V. COUNTY OF MURRAY, GA.*

Petitioner's errant deliberate indifference reasoning is starkly demonstrated by her assertion that the facts of this case parallel the evidence in *Vineyard v. County of Murray*.[2] Petition at 16. They do not. To the contrary, a comparison of the facts and decisions in this case and in *Vineyard* provides a strong basis for concluding that the Town of Lake Hamilton is not constitutionally responsible for Stines' attack on Petitioner. And, notwithstanding Petitioner's protestations to the contrary, a comparison of the conduct alleged in the two cases demonstrates that the standard of municipal liability was correctly applied by the Eleventh Circuit in this case.

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2. 990 F.2d 1207 (11th Cir. 1993), *cert. denied*, 510 U.S. 1024, 114 S. Ct. 636, 126 L. Ed. 2d 594 (1993).

*Vineyard* involved a claim that law enforcement officers abused their authority to use physical force. The use of force is a necessary and obvious part of police work and it is therefore reasonable to anticipate, and train for, the circumstance where an officer must make a choice between levels of force. There have been any number of decisions, including *Vineyard*, which have observed that the need to train for use of force is so obvious that a municipality is deliberately indifferent if it fails to do so. Plaintiff's expert in *Vineyard* specifically noted that the purpose of use of force policies, training, and supervision was "to stop the use of gratuitous force." *Vineyard*, 990 F.2d at 1213. Some level of police use of force, in other words, is expected and acceptable. It is the obviously foreseeable need for an officer to be able to draw the line between proper and improper force that allows a lack of adequate training and supervision in the use of force to rise to the level of deliberate indifference required by *City of Canton*. There is no obviously foreseeable need for an officer to be able to draw the line between proper and improper sexual assault. Thus, failing to train, instruct or otherwise supervise Officer Stines to prevent it was not deliberate indifference to the rights of Sewell.

At page 17 of the Petition, another significant misinterpretation of testimony is made by Petitioner. According to Petitioner, Police Chief Freeman testified that he knew of a "risk" that an officer might sexually assault a female suspect. Petitioner then contends that this "risk" meets the strict "deliberate indifference" standards of *Monell* and *Canton*. Knowledge of an unsubstantiated, never-before-occurring, extreme and criminal "risk" is the absolute thinnest of threads on which to hang a claim that the Town of Lake Hamilton was the moving force behind Stines' conduct. This Court should flatly reject it. Petitioner compares *City of Canton* and *Monell* causation questions in the contexts of excessive force cases with the criminal sexual assault in the instant case. Petitioner observes

that excessive force claims under the causation standard implicit in the Eleventh Circuit's opinion in this case more readily yields municipal liability for excessive force cases than it does for criminal acts of sexual assault.

> That reasoning produces the absurd result that the more egregious the employee's conduct, the more likely the exoneration of the municipality, despite the fact that the municipality was at fault.

Petition at 21.

*Of course* a municipality is more likely to be liable under § 1983 for a claim of excessive use of force by its officers rather than criminal actions of those officers. This is a direct and sensible result mandated by the legal proposition of *Monell* that municipalities are liable for only those constitutional violations they ***cause***. Because municipalities know that their officers will have to use force, failure to train them on it can sometimes be said to cause a constitutional abuse of the police officer's legal authority to use force. *See, e.g., Vineyard*. But, where an officer — without any warning to the municipality — undertakes a blatantly criminal enterprise, then it is legally inconceivable that a municipality could be said to have *caused* it. The difference is that police officers have the authority by virtue of their municipal employment to use force. They do not have the authority to sexually assault suspects.

It bears repeating here that Petitioner sued only the Town, and only for a violation of § 1983. When the Petitioner states that the Town was "at fault," it must be remembered that the only question of fault of the Town at issue here is one of constitutional dimension. Petitioner may not gloss over the degree of fault that must be shown in a § 1983 case in hopes that, at some point, the degree of the Town's arguable common

law negligence will rise to the requisite level of showing § 1983 causation. One need only read the Petitioner's Statement of the Case to recognize the effort to blur the line between the two. This was *not* a state law negligence case and common law principles of the Town's "fault" do not sufficiently define § 1983 causation.

Petitioner claims that a number of policy and procedure inadequacies proved an "abdication" of control by the Respondent Town. Petition at 16. Among these inadequacies are claims that the Town failed to formally train or supervise new recruits, violated Florida law on the receipt, investigation and determination of citizen complaints, staffed its midnight shift with lone male police officers, and failed to maintain policies regarding sexual harassment. Yet it is painfully obvious from a review of these alleged facts that an application of the law of § 1983 could not possibly yield liability in this case. How can anyone seriously contend that absence of a formal sexual harassment policy *caused* Stines to attack Petitioner? Even more importantly, what does it portend for the thousands of small town police departments around the country if it is unconstitutional to have only one officer on duty at off-peak times?

Petitioner claims that the Town's police chief testified that absence of the above-described policies "created the risk of a police officer assaulting a female suspect." Petition at 17. Chief Freeman testified that absence of supervision would naturally mean that one could not prevent some criminal actions by officers because there is no one there to stop them. But it is too great a leap to claim that his testimony was that the absence of supervision *caused* this incident to take place.[3] Where there is

3. Petitioner alleges in a single hasty and unsupported sentence that an unmanned police station in a town of 1,000 people at three o'clock in the morning "caused Officer Stines to commit his assault." Petition at (Cont'd)

prior notice of particular wrongdoing, or failure to train for situations within which the police may be presumed to have to make legitimate choices between courses of conduct, one can show deliberate indifference by a municipality in its preparation of the officers for that circumstance. But one cannot simply assume in context that the failure to so train is the causal element in a sexual assault. That is no more true than the claim that absence of supervision causes a police officer to commit any other type of crime.

What is perhaps most disturbing about Petitioner's contention about supervision of lone male police officers is the implicit premise that all male officers are predisposed to this type of behavior. The Petitioner claims that the Town was deliberately indifferent to the rights of Petitioner because it allowed a single male officer to patrol the Town in the early morning hours — as though it was the lack of supervision that caused Stines to act as he did — based on nothing more than a generalized knowledge that an officer might engage in some type of misconduct. If so, is it not *always* unconstitutional to allow *any* male employee of *any* municipality to be alone with a female member of the public in *any* setting?

## III.

## THE "OBVIOUSLY WRONG" TEST MAKES COMMON SENSE.

Persuasive to the Eleventh Circuit's determination that there could be no policy or custom of the Town that caused this event was the Second Circuit's opinion in *Walker v. City of New York*, 974 F.2d 293 (2nd Cir. 1992), *cert. denied*, 507 U.S. 961, 113

(Cont'd)

25, n.3. Respondent submits that the illogic of this claim speaks volumes about Petitioner's colossal confusion of the creation of opportunity with the causing of unconstitutional conduct.

S. Ct. 1387, 122 L. Ed. 2d 762 (1993). In *Walker*, police officials and an Assistant District Attorney (ADA) committed perjury, and the ADA withheld exculpatory evidence in convicting an innocent man, Walker, of murder. *Id.* at 295. The conviction was overturned and Walker was set free some 19 years later when the illegal actions of the police officials and the ADA were discovered.

Walker sued the City under § 1983, arguing that the City should have trained and supervised its police so that they would not commit perjury. He also claimed that the City was independently liable under § 1983 for the actions of the ADA in withholding exculpatory evidence. Despite the atrocious conduct of the officials involved in the conviction, the district court dismissed Walker's complaint — *precisely because* the acts were so outrageous that there was no obvious need to train officials not to commit them. On appeal, the Second Circuit affirmed the dismissal as to the perjury-related contentions, but reversed as to the *Brady v. Maryland*[4] exculpatory evidence violations by the ADA.

Citing the need to provide training and guidance in the pursuit of fleeing felons, the Second Circuit rendered a holding that foretold the opinion of this Court in *Brown*:

> It is not enough to show that a situation will arise and that taking the wrong course in that situation will result in injuries to citizens . . . *City of Canton* also requires a likelihood that the failure to train or supervise will result in the officer making the wrong decision. Where the proper response — to follow one's oath, not to commit the crime of perjury, and to avoid prosecuting the innocent — is obvious to

4. 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

> all without training or supervision, then the failure to train or supervise is generally not "so likely" to produce a wrong decision as to support an inference of deliberate indifference by city policymakers to the need to train or supervise.

*Walker*, 974 F.2d at 299-300.

As in *Walker*, the Eleventh Circuit held in the instant case that Stines' conduct was so egregious, so criminal, and so outside the realm of acceptable police behavior, that it would be absurdly unreasonable to demand that the Town of Lake Hamilton anticipate and train against it. By way of comparison, the Town of Lake Hamilton must, like all police departments, assume that its officers will be required to use force in apprehending suspects. The Town might be deliberately indifferent to the rights of suspects if, knowing that force will be necessary, the Town chooses not to instruct its police officers in proper use of force. At some point, however, the Town must be entitled to rely on the good sense of its officers not to attack the public.

Even more illustrative of the critical importance of the "obviousness" line in these cases is the fact that the *Walker* court, having upheld dismissal of the claim based on police perjury, held that the ADA might have created liability for the City in failing to meet his *Brady* obligations. The Second Circuit's rationale behind this result was twofold. First, in contrast to the commission of perjury by the police, the district attorney knew "to a moral certainty" that ADAs would acquire *Brady* material. *Walker*, 974 F.2d at 300. Second, again in contrast to the commission of perjury, the determination of which evidence to turn over under *Brady* was unclear at the time of the original conviction, requiring training and supervision to make sure that the ADAs acted appropriately. *Walker*, 974 F.2d at 300. It has never been legal for police officers to sexually attack or barter

with their suspects. One wonders exactly what kind of training the Petitioner believes the Town of Lake Hamilton should institute to prevent its officers from attacking members of the public.

In the instant case, the Eleventh Circuit similarly could not hold that Chief Freeman or the Town of Lake Hamilton knew "to a moral certainty" that its officers would be called upon to choose when it would be permissible to sexually assault a suspect. The incident that forms the basis of this case is simply so far removed from the worries town officials understandably should have for their police officers that, as a matter of law, the Town was not deliberately indifferent for not having anticipated it. As the court in *Walker* observed:

> [P]laintiff Walker has catalogued a host of misdeeds by city employees that led to his wrongful imprisonment. Some of these misdeeds relate to such basic norms of human conduct — the duty not to lie or persecute the innocent — that in the ordinary case a municipal policymaker need not expend precious resources on training or supervision but can instead rely on the common sense of her employees.

*Id.* at 301.

Petitioner argues that the Eleventh Circuit in this case misapplied the "obviously wrong" test in *Walker*. Specifically, Petitioner contends that the focus in this Court's decision in *City of Canton* is not on the obvious wrongness of the tortfeasor employee's conduct, but on the obviousness of the need to provide the training against it. Petition at 19. Petitioner reasons that the Eleventh Circuit's examination of Stines' conduct improperly shifted emphasis from the Town's policy to Stines' act. A review of *City of Canton*, of *Walker*, and of the decision

in this case demonstrates that Petitioner's distinction is one without a difference.

In this case, as in *Walker*, the conclusion was that the action representing the constitutional deprivation was so obviously wrong that one could not conclude that an official policy or custom, in § 1983 parlance, caused it. The *reason* that the policy or custom could not be said to have caused the action lies in the fact that causation in § 1983 municipal liability cases means that the policy or custom was the "moving force" behind the deprivation. In practice, if the action of the officer is so clearly wrong that it was not caused by the municipality, then it is not obvious that one needs to train against it. That is, if the actions of Stines in attacking the Petitioner cannot be causally related to any policy or custom due to its heinous nature, then neither can one conclude that the need to train against the act was obvious. Petitioner claims that it is error to mix the two questions. But this case demonstrates that the two issues are often functions of the same basic premise. A municipality is not acting unconstitutionally when it does not adopt a policy or custom intended to avoid conduct which is so facially repugnant that a defect in human character — rather than a lack of appropriate policy — is to blame.

## IV.

## THERE IS NO CONFLICT WITH *CITY OF CANTON*.

Petitioner contends that the Eleventh Circuit's decision in this case cannot be squared with this Court's decision in *City of Canton*. The Petitioner argues that the Town's final policymaker, Chief Freeman, testified that he knew to a moral certainty that a lone male police officer would be alone with a female suspect. Therefore, Petitioner reasons, Chief Freeman acted with deliberate indifference when he did not train his officers on how to act in that setting.

Chief Freeman's knowledge to a moral certainty that his lone male police officers would sometimes deal with female suspects *does not*, by any means, translate to an automatic constitutional duty to train those officers not to attack those suspects. Once again, Petitioner distracts the Court by shifting the focus from what specifically happened in this § 1983 case to general complaints about police procedure. Does a police department need to train its officers in the basics of stopping, questioning, and possibly apprehending criminal or traffic suspects? Certainly, and the Town of Lake Hamilton indisputably accomplished that training through the police academy and field training. But can it also be said that the Town of Lake Hamilton acts unconstitutionally when it fails to anticipate that an officer will coerce a woman to the floor, spread-eagled and nude, because he has "never had a redhead before?" Petition at 5. Of course not.

The Petitioner misinterprets the well-settled law of § 1983 when she contends that the Town of Lake Hamilton knew to a moral certainty that its male officers would confront female suspects, leading to a sufficient risk of criminal sexual assault such as to require training against it. If the Petitioner wants to attack the underpinnings of that law — *i.e.*, *Monell* — she is welcome to do so. But the very transparent appeal to outrage and sympathy in the Petition does not change the fact that Petitioner must live with the consequences of the type of lawsuit she filed. Ultimately, the more outrage one may feel at what happened to Ms. Sewell, the more careful the Court must be to ensure that the party *she has sued* — the Town of Lake Hamilton — is truly at constitutional fault. *Brown*, 117 S. Ct. at 1391.

## V.

## THIS CASE DOES NOT WARRANT RECONSIDERATION OF *MONELL*.

The Respondent obviously has absolutely no argument with Petitioner's contention that her election to sue *only* the municipality and *only* for a violation of § 1983 makes recovery by her very difficult. Petitioner has suggested that the law of § 1983 itself, rather than the facts of this case, lead to her difficulty in winning this lawsuit. If the law of *Monell* is to remain the law of municipality § 1983 liability, then it is painfully obvious that the Town of Lake Hamilton was neither deliberately indifferent to Petitioner's rights nor the cause of their violation. This is so because Petitioner's proof of fault by the Town simply could not have risen to the level required by *Monell*, *City of Canton*, and now *Brown*. The only question remaining, then, is whether the municipal liability requirements of those cases are sound.

### A. Reexamination Of *Monell's* Municipal Fault Requirement Is Not Warranted.

Justice Breyer's dissent in *Brown* raised a number of issues with respect to *Monell's* distinction between vicarious liability and liability due to direct fault of the municipality. There is no doubt but that civil rights plaintiffs will often have a difficult time proving that a municipality caused a constitutional violation and that it did so through a policy or custom that has been adopted with deliberate indifference to constitutional rights. Rather than operating as a justification for relaxing *Monell's* standards, however, the Respondent would point out that this difficulty shows only that the nature of the need for the Civil Rights Act of 1871 has changed in the last 120 years such that the original purpose of § 1983, to root out conspiracies involving

local and state governmental officials, translates now into a justification for holding municipalities liable for the acts of officers *only* when the municipality plays a role in the constitutional violation.

A close examination of the historical backdrop of the Civil Rights Act of 1871 shows a twofold purpose. First, the Congress felt that local and state officials in the Southern States were ignoring their duties in enforcing the provisions of the Thirteenth and Fourteenth Amendments. Because these officials also represented the local judiciary, a remedy in the federal court system was needed to improve the odds for effective enforcement of those amendments. Second, Republican Congressmen wanted a federal tool to battle local and state Democratic leaders who, in concert with the Klu Klux Klan, were attempting to literally ride the Republican party out of the post-Civil War South. As will be seen below, the record of Congressional debate unquestionably proves that the purpose of § 1983 was to provide a federal resource against conspirators, including government officials, who sought to violate the rights of recently freed slaves and drive the Republican party to the North. One hundred twenty years later, and built upon the foundation of the 1871 Act, the statute is appropriately construed as requiring that remedies directly against local governments be had only when the local government plays an active role in the constitutional deprivation.

The extraordinary debate on this legislation is found in the Congressional Globe, 42nd Cong., 1st Sess. (1871), at Appendix pages 67-316 (hereinafter Globe App.). That debate, from Rep. Shellanbarger's comments at the start to Rep. Burchard's impassioned speech at the conclusion, show that the entire bill, including Section 1 (now § 1983), was intended to attack conspiracies of the Klu Klux Klan and Democratic officials in the Southern States. Other sections of the bill included criminal penalties for conspirators as well as authorization for the

President to use national military forces to quell riots and rebellions. Rep. Burchard spoke of Klan conspiracies and their ability to reach local constables and judges, stating that Section 1 was expressly intended to sidestep local officials who were part of the post-War terror targeting freed slaves or Republicans from the North and "afford an injured party redress in the *United States courts*." *See* Globe App. 312 (emphasis added).[5]

Rep. Burchard's statement followed hours of debate during which a number of members of both houses recited tale after tale of disguised Klan members literally getting away with murder as state and local Democratic officials turned a blind eye. Reps. Bright and Maynard, for example, engaged in a question and answer dialogue typical of the issues considered. *See* Globe App. 309-310. In that exchange, Rep. Maynard

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5. Most importantly, and as this Court recognized in *Monell*, the second conference report on the bill substituted a new provision which, rather than create municipal liability for acts of private violence, created liability for any person who learned of an impending civil rights violation but did nothing to stop it. *Monell*, 436 U.S. at 668-669. The earlier version of the conference report, which would have included the Sherman Amendment, was argued to be necessary because the southern municipalities were thought to be part and parcel of the private violence problem. As *Monell* properly recounts, there was at that point an extensive history of federal action representing "affirmative interference" by the Congress in forcing the southern states to act constitutionally with respect to their former slave citizens. Enlisting as many actors as possible — from wealthy property owners afraid of paying damages for a Klan riot to municipalities who would lose their treasuries if they continued to "look the other way" — might have been more effective than the conspiracy provision that ultimately passed, but it would have put poorly equipped people or towns on the front line of the *federal government's* fight to protect United States citizens. That is, vicarious liability for either the private property owners or the local governments would have put them in the business of insuring for (as opposed to ensuring against) the losses experienced by victims of the conspiracies described by the Congress.

described a series of events in Murfreesboro, Tennessee shortly after the Governor of the state was stripped by the Legislature of his ability to enforce laws against, among other things, the Klan. One night, a group of "disguised men" attempted to break into the home of "an old colored man." The homeowner shot and killed one of the marauders (who to the glee of Democratic officials may have been a Republican) and drove the rest away. The "colored man" was immediately arrested, but it was not until federal authorities went to the town for the express purpose of enforcing the Fourteenth Amendment that the marauders were arrested.

Federal enforcement of Constitutional rights, Rep. Maynard argued, was the only means by which the Congress could be sure that local government officials would be held accountable for their part in the conspiracy to violate the rights of, not just former slaves, but their Republican supporters, too. His comments on the "color of law" language are most illuminating. That phrase, he said, "simply declares in substance that whoever interferes with the rights and immunities granted to the citizens of the United States, *though it may be done under State law or State regulation*, shall not be exempt from responsibility to the party injured." *See* Globe App. 310 (emphasis added). These comments demonstrate that the purpose of Section 1 was not to create a whole new class of governmental liability for violation of civil rights by private persons. Rather, Section 1 was needed so as to prevent state and local government officials from hiding behind the official nature of their acts to further their illegal activities with the Klan.

Several Senators and Representatives described the testimony their committees had heard from former Klansmen. Rep. Stevenson recounted the testimony of Mr. William Tolbert who described a mob killing without fear of arrest. *See* Globe App. 291. According to Tolbert's testimony, the Klan was an arm of the Democratic party. Its purpose was "to regulate the

Republican party, break it up if they could, and strengthen the Democratic party." Mr. Tolbert and his compatriots were under strict orders from Democratic and Klan bosses to kill Union Leaguers and Republicans, to search out their meetings and shoot indiscriminately into them. Lack of interference from government officials was guaranteed because, even if they weren't personally involved in the riots, they were certainly part of the conspiracy.

Rep. Stevenson concluded his comments by shaming Democratic party officials, noting that they opposed the bill for purely political reasons and under the guise of "throwing off carpet bag government." *See* Globe App. 299. The only remedy to the Klan and its government supporters was to criminally sanction the conspirators and allow redress in "the national courts." The Klan, combined with local Democratic officials in the Southern States, represented "the germs of another rebellion," Stevenson said. *See* Globe App. 282. The only way to stop them was passage of a bill which would attack the Klan and prevent the local Democratic politicians from assisting them in their activities.

In sum, the record of debate on § 1983 shows that its original purpose was to interpose the federal government, through the federal courts, in the battle over the politics governing the South. The purpose was not to target state and local governments, or its officials, as a *distinct* group of civil rights violators. Rather, so that these officials' *active* part in the conspiracy to drive out the Republicans would not continue, § 1983 was intended to prevent Democratic party members from hiding behind their official authority. The statute's imposition of liability on government officials was directed at those specific officials who played a role in the local atrocities of the Klan and the Democratic party members, not at the *institutions* of the governments themselves. This is in accord with rejection of the

Sherman Amendment's imposition of liability on people and governments who had no direct involvement in the conspiracies.

Most importantly, a reading of the legislative history shows that the statute was intended to provide a means to hold liable and accountable those officials who *actively* conspired to drive the Republicans out of the South, not to create some general vicarious liability for their municipalities. The purpose of Section 1 of the Civil Rights Act of 1871 was not to hold governments liable for damages, but to prevent government officials from hiding behind the official nature of their acts when conspiring with private individuals to violate the rights of the citizenry. There is not one iota of support in the debate over H.R. 320 for the proposition that it was the governments *themselves* upon whom Congress sought to impose liability.[6] In today's § 1983 law, that purpose is served well by the notion that the only means of holding the government *itself* liable is where the government took official action or policy that played a role in the constitutional deprivation.

Petitioner in this case could have sued Officer Stines under § 1983 for violating her rights and, based upon this record, almost certainly would have been successful. But she did not. She chose instead to sue the Town of Lake Hamilton. Without a showing that individual policymaker officials of the Town played the equivalent of a conspiratorial role in the effort to violate her rights, the spirit and letter of § 1983 do not provide a basis for recovery. The Town of Lake Hamilton *itself* had no policy or custom, adopted through an official policymaker, that caused the assault on the Petitioner. Petitioner's effort to cast the net of liability so wide as to include the Town, when it was a rogue

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6. Indeed, if there is to be a reexamination of *Monell*, perhaps it should be about whether there is any municipality liability at all under § 1983, as opposed to whether § 1983 applies only to individual government conspirators.

officer acting alone who violated her rights, stretches § 1983 beyond its stated purpose. Just as § 1983 prevented the Murfreesboro sheriff from hiding behind his badge in the 1870's, § 1983 prevented Stines in the 1990's from using his status as a police officer to escape liability for his attack on the Petitioner. That is all that § 1983 was intended to accomplish and Petitioner's failure to sue the party who violated her rights or prove the modern day equivalent of conspiracy (an official policy or custom causing the deprivation) precludes recovery in this case.

**B. This Case Does Not Represent An Appropriate Vehicle For Reexamining *Monell*.**

One hundred twenty years after enactment of § 1983, Petitioner seeks to impose on the Town of Lake Hamilton liability for the acts of a person who acted under color of law, but who did so without the benefit of a governmental conspiracy (or official policy or custom) behind him. Simply because this case does not lend itself to municipal civil rights liability is no reason to reverse the underpinnings of § 1983 law. What is missing from Petitioner's brief is a *reason* to reexamine *Monell*. It is one thing to note that at least a portion of the Court would like to rethink *Monell*. What is less clear is whether this is the right case for undertaking that endeavor. The Respondent submits that, even if the Court wishes to reexamine the municipal liability requirements imposed by *Monell*, this case provides a poor record basis for doing so.

In *Brown*, there was an extensive record of prior notice to the municipality's decision maker of the potential for a constitutional violation by the employed tortfeasor. For example, the officer in *Brown* had a record of driving infractions, a guilty plea to criminal driving charges, a misdemeanor conviction for assault and battery and resisting arrest, and charges related to

public drunkenness. *Brown*, 117 S. Ct. at 1387. The only "prior" evidence of a warning in this case is an incident that occurred virtually simultaneously with the assault on Petitioner (the Sharon Washington incident).

Justice Souter's dissent in *Brown* placed great emphasis on the presence of a significant record of prior warnings and on the jury's apparent disbelief[7] of the sheriff's testimony that he did not see those warnings. *Id.* at 1399. Justice Souter specifically observed that the jury could have found, on the strength of the prior warnings, that the tortfeasor employee in that case had

> [S]uch a propensity for violence and a disregard for the law that his subsequent resort to violence was the plainly obvious consequence of hiring him as a law enforcement officer authorized to employ force in performing his duties.

*Id.* (citation omitted).

If this Court chooses to reexamine *Monell*, the Respondent urges that it do so on the basis of a record that allows a finding of varying degrees of fault by the Town. In this case, the Town could only be liable for Petitioner's injury if *Monell* were completely abandoned and respondeat superior liability allowed. On the other hand, another case like *Brown*, with questions of the degree of warning of improper conduct and sufficiency of investigation by the municipality, would provide a far superior opportunity to rework the standard for showing deliberate

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7. Justice Souter concluded that the jury may have believed that the sheriff lied about what he knew of the officer's record so as to protect his family member and his reputation. *Id.* at 1399. There is nothing in this record approaching that sort of intentional act taken despite a known high risk of unconstitutional conduct by the employee.

indifference. While some of the dissenters in *Brown* questioned complete rejection of *Monell*, all expressed concern over whether the record in that case met the tough standards of municipal § 1983 liability. This case does not represent an appropriate record to revisit those standards and the Petition should be denied.

## CONCLUSION

For the foregoing reasons, the Respondent requests that the Court deny the Petition.

Respectfully submitted,

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